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Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

DAVID KONG and JOHN MESSINA,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, ET. AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the sale of .38 acre of city-owned Mount Davidson Park public land containing a one-hundred-three-foot (103') tall cross to the Council of Armenian American Organizations of Northern California violated the United States Constitution's Establishment Clause.

2. Whether the California Constitution's No Preference/No Aid Clause can apply if a religious display previously found to be unconstitutional when located on government owned land is currently displayed on private property.

3. Whether the sale of city-owned Mount Davidson Park public land containing a one-hundred-three-foot (103') tall cross to the Council of Armenian American Organizations of Northern California violated the California Constitution's No Preference/No Aid Clause.

PARTIES TO THE PROCEEDINGS

David Kong and John Messina, Petitioners

City and County of San Francisco; San Francisco Recreation and Parks Commission; Joel Robinson, in his official capacity as acting general manager of the Department of Recreation and Parks; Council of Armenian American Organizations of Northern California, A California Corporation, Respondents.

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The Ninth Circuit Court of Appeals November 22, 2002 judgment denying the Petitioners Petition for Rehearing and a Petition for Rehearing En Banc. The Appellate decision regarding the Petition for Rehearing and Petition for Rehearing En Banc is herewith reprinted in the separate Appendix to this Petition, p.64.

The Ninth Circuit Court of Appeals September 5, 2001 Appellate Court judgment, labeled as Case No. 00-15261 affirmed the District Court opinion of January 3, 2000. The Appellate decision is herewith reprinted in the separate Appendix to this Petition, p. 56.

The District Court opinion from the United States District Court for the Northern District of California, from which the Ninth Circuit Appeal was made, labeled as Case No. C97-4072 MMC, is hereby reprinted in the separate Appendix to this Petition, p. 31.

STATEMENT OF JURISDICTION

The District Court had jurisdiction over the underlying case based upon 28 U.S.C. §1331, 28 U.S.C. § 1343, 42 U.S.C.§ 1983, as well as the First and Fourteenth Amendments of the United States Constitution. Additionally, the District Court had jurisdiction over the non-federal claims pursuant to its ancillary and pendant jurisdictional powers. The United States Court of Appeals for the Ninth Circuit has jurisdiction over this matter pursuant to Federal Rule of Appellate Procedure Rule 3 and Rule 4. The jurisdiction of this Court is invoked pursuant to Rule 10 (a) of the Rules of the United

States Supreme Court, based on the Ninth Circuit Court of Appeals' denial of Petitioners Petition for Rehearing and Petition for En Banc review. Further jurisdiction is found from the September 5, 2001 appellate decision in this case after Paulson v. City of San Diego, 294 F.3d 1124 (9th Cir. 2002) was decided, which created a conflict within the Court of Appeals of the Ninth Circuit between the case at hand and Paulson.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

First and Fourteenth Amendments of the United States Constitution reprinted in the Appendix. Article I, Section 4 of the California Constitution and Article XVI, Section 5 of the California Constitution reprinted in the Appendix.

STATEMENT OF THE CASE

Factual Summary

Mount Davidson Park is composed of approximately forty-three (43) acres of wooded land situated on Mount Davidson in the City and County of San Francisco. In 1996, the Ninth Circuit Court of Appeals held that San Francisco's ownership and maintenance of a cross that measures one-hundred-three (103') feet tall and thirty-nine feet (39') across located at the plateau of Mount Davidson violated the No Preference Clause of the California Constitution, and remanded the case to the district court to fashion an appropriate remedy for the City to divest itself of the cross. Carpenter v. City and County of San Francisco, 93 F.3d 627, 632 (9th Cir. 1996).

On March 31, 1997 Petitioner John Messina sent a letter to the mayor's office via certified mail, expressing his interest in purchasing the land and requesting information about the proposed sale and expressing his concerns that religious organizations not be given preference.

In June 1997, the San Francisco Recreation and Parks Commission adopted a resolution approving the formulation of a proposal for selling the property atop Mount Davidson on which the cross stands. Subsequently, the City published an Invitation to Bid in the *San Francisco Independent*, the newspaper that the Board of Supervisors had, at that time, designated for publication of all official City advertising. The Invitation to Bid announced, among other things, that (1) the City would conduct a tour of the property on July 8, 1997 for all interested parties; (2) to participate in the auction , bidders must pre-qualify by July 14, 1997 by submitting a $20,000.00 deposit, constituting the minimum bid; (3) the City reserved the right to cancel or to postpone the auction and to reject any and all bids; and (4) the City's transfer of the property would be subject to confirmation by the Board of Supervisors, the Mayor and the electorate as required by law.

Petitioner Dave Kong attended the tour of the property but had concerns about the constitutionality of the sale as structured, and therefore did not wish to participate in the auction. Although Petitioner John Messina requested notice in a timely fashion, he was not given notice of the tour of the property nor any information regarding bidder requirements. Petitioners John Messina and Dave Kong were not aware of each others activities at this time and did not meet until after the auction had been held. Petitioner Messina's letter of March 31, 1997 was not responded to by the mayor's office until July 15, 1997, one day after the pre-qualification requirement deadline.

In the letter there was no mention of the auction, only a vague statement that "details are being worked out." On July 19, 1997, Petitioner Messina's attempt to pre-qualify for the bidding was rejected as untimely.

The auction was held on July 21, 1997. The only bidders at the auction were "Cross-friendly" bidders including the Museum of the City of San Francisco, the Friends of Mount Davidson, and the Council of Armenian Organizations of California, hereinafter "Council", which ultimately purchased the cross. At that point the City deeded the land over to the Council, subject to several requirements which were originally mentioned in the invitation to bid, including requirements that the land remain open to the public and that no new structures could be built on the land. The City thereafter no longer owned the property.

Rulings Below:

After the Ninth Circuit Court of Appeals in Carpenter found, as stated above, the City's ownership and display of the Mount Davidson Cross to violate the California Constitution's No Preference Clause, the Ninth Circuit ordered the District Court to fashion a constitutional remedy for the City to divest its ownership of the Cross.

The District Court's remedy, which resulted in the land and the Cross being sold to the Council of Armenian American Organizations of Northern California, entailed, among other things, the requirements that the land sold remain open to the public and that no new structures be built on the land. This remedy caused the Petitioners to file suit in District Court. The Petitioners claimed that the City's process of divesting itself of the Cross violated, among other things, the United States

Constitution's Establishment Clause and the California Constitution's No Preference/No Aid Clause. The District Court in the Petitioners' case found that since the city conveyed the parcel of land on which the Mount Davidson Cross is situated, the display of the Cross no longer violated the No Preference/No Aid Clause of the California Constitution. The District Court also found that the Establishment Clause of the United States Constitution was not violated because the sale of the land under the Cross was neutral, complied with the court's mandate in Carpenter and neither advanced nor inhibited religion.

Petitioners then appealed to Ninth Circuit Court of Appeals. The Ninth Circuit found that the remedy fashioned by the parties in Carpenter adequately resolved any California Constitution No Preference/No Aid Clause violation because the Cross is now located on private property. The Ninth Circuit also found no United States Constitution Establishment Clause violation because the case at hand differed factually from Freedom From Religion Foundation, Inc. v. City of Marshfield, 203 F. 3d 487 (7th Cir. 2000), a decision which found a violation of the United States Constitution's Establishment Clause when the city of Marshfield divested itself of a statue of Jesus Christ located in a public park. The Ninth Circuit Court of Appeals thereafter denied Petitioners' Petition for Rehearing and Petition for Rehearing En Banc

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S ACTION OF FINDING THAT THE CITY'S SALE OF .38 ACRE OF MOUNT DAVIDSON PARK CONTAINING A ONE-HUNDRED-THREE-FOOT TALL (103') CROSS TO A PRIVATE ORGANIZATION DID NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE UNITED STATES CONSTITUTION.

a.) The sale of city-owned public park land containing a one-hundred-three-foot (103') tall cross to the Council of Armenian American Organizations of Northern California violated the Establishment Clause of the United States Constitution.

In Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105 (1971), the U.S. Supreme Court provided a three part analysis when reviewing government action and practices for violations of the Establishment Clause. To pass the Lemon analysis, "a statute or practice which touches upon religion . . . (1) it must have a secular purpose; (2) it must neither advance nor inhibit religion in its principal or primary effect; and (3) it must not foster an excessive entanglement with religion." In order to pass the Lemon test, the challenged practice must survive all three prongs. Edwards v. Aguillard, 482 U.S. 578, 583, 107 S.Ct. 2573 (1987). The City's sale of the land containing the cross to the Council violates all three factors of the Establishment Clause test as laid out in Lemon because the City placed use restrictions on the land that would not allow any new structures to built on the land and that required the land remain open to the public.

A government practice fails the secular prong of the Lemon test, if its purpose is to endorse a religious custom or viewpoint. Edwards at 593; Wallace v. Jaffree, 472 U.S. 38, 60, 105 S.Ct. 2479 (1985). The sale of the land containing the Cross had no secular purpose, whatsoever, but was conducted for the sole purpose and had the primary effect of providing support, preference and endorsement of the Christian religion through the preservation of the Cross. While the sale permitted Christians to maintain their primary religious symbol (the Cross) on the property, the requirements prohibited those of other faiths from replacing it with a minaret, statue of Buddha, mosque, or symbol of any religion.

The City's actions, in divesting itself of the unconstitutional cross by auctioning off the land with the above-mentioned requirements advance religion as their primary effect, as shown in the following hypothetical. If two bidders wished to purchase the land, one who does not want the Cross displayed in the public park, and one who wishes to preserve the Cross, and both had the same amount of money, the bidder wishing to preserve the Cross would have a distinct advantage in bidding because no additional funds would need to be reserved to remove the Cross. In addition, the non-Christian bidder would not be allowed to build any new structures on the land, even structures that accommodate the public such as a lecture area or a small amphitheater. Further, the land the non-Christian bidder purchased would have to remain open to the public, therefore he would have essentially no property rights except for the right to remove the unconstitutional cross. Essentially, the land for the non-Christian bidder would be useless. However, for the Christian bidder, the Cross would be used for various Christian events, such as weddings, baptisms and Easter sunrise services, or, because the Cross is such an undeniably powerful religious symbol, just let it stand and

continue to spread the message of the Christian faith.

The restrictions placed on the land by the City also excessively entangle government with religion. The City must enforce restrictions on the land, i.e., no new structures, allowable lighting times and public access. The City also provides and maintains all of the supporting services necessary for ingress and egress to and from the Cross as well as services to ensure the comfort and safety of visitors to the Cross. Continual provision and maintenance of these supporting services, including the roads and trails that provide the only means of access to the Cross are indicative of administrative entanglement barred by the Establishment Clause. See Lemon 403 U.S. at 619. What the City and County of San Francisco can do to fix the problem is to remove the Cross at their own expense and remedy a constitutional wrong.

b.) The Court of Appeals for the Ninth Circuit's affirmation of the District Court's finding that the City's sale of the Mount Davidson land containing the Cross did not violate the Establishment Clause of the United States Constitution is directly contradicted by case law.

The finding of the District Court, affirmed by the Ninth Circuit Court of Appeals, that the Establishment Clause of the United States Constitution was not violated when the City auctioned the .38 acre under the one-hundred-three (103') foot tall cross to the Council, with requirements that the land remain open to the public and prohibiting any new structures, is erroneous because of the above-listed reasons and is directly contradicted by case law. In Freedom from Religion Foundation v. City of Marshfield, Wisconsin, 203 F.3d 487 (7th Cir. 2000), hereinafter "Marshfield", the Freedom from

Religion Foundation and a local businessman sought declaratory and injunctive relief with respect to a statue of Christ that was located in a City Park and visible from a major thoroughfare. The Seventh Circuit Court of Appeals found that, although located on private property, the statue's location created the perception of City endorsement of religion in violation of the Establishment Clause.

> Praschak Wayside Park is a city park in a traditional public forum. Therefore, unless we determine that the sale of a section of this park to a private organization has changed the nature of the park, we will apply the task considered in Capital Square to the facts before us. Despite the sale of the park to a private body, we find that the fund property constitutes part of the public forum. We acknowledge that there is no clear precedent on the matter whether private property can be considered a public forum, [citation omitted] but we base our findings on three factors - the historical association of the fund property with a public forum; the dedication of the property to public use; and the physical location of the 0.15 acre fund site in relation to the public park and the location and orientation of the statue of Christ within it. Freedom from Religion Foundation, Inc. v. City of Marshfield, Wisconsin, 203 F. 3d 487, 493 (7th Cir. 2000).

The three factors used in Marshfield apply equally to the case at hand. First, there is a historical association of the property with a public forum, namely the property is part of the Mount Davidson public park, which is considered a traditional

public forum. Second, the City has explicitly required that the land remain open to the public, therefore the land continues to be dedicated to use as a public forum. Finally, the physical location of the .38 acre sold in relation to the public park and orientation of the Cross within it constitutes part of the public forum. Built in 1934, the Cross is located at the summit of Mount Davidson and acts as a landmark for the park, being visible from many parts of the City and beyond. It is a familiar part of the San Francisco skyline. When the public thinks of Mount Davidson Park, the first thing that comes to mind is the immense one-hundred-three-foot (103') tall cross.

The City has argued that since they have six plaques containing disclaimers around the Cross stating that the Cross has been sold to a private party, there is a separation between the privately owned Cross and the rest of the public park. However, the plaques placed at the entrance ways to the park cannot sanitize the perception of a visitor to the City of San Francisco who sees the Cross, but does not go to the park. Further, as Justice Canby stated in his opinion of the case at hand, "The City's disclaimers, although well-phrased and explicit, are not enough to overcome the perception arising from the actual use of the land. From the public's viewpoint, nothing has really changed; the land that was public as part of the park remains public despite the change of title, and the religious display remains on it". See Marshfield, 203 F.3d 487, 495 (7th Cir. 2000). Justice Canby continues, "In essence, the land has become a public forum in which only one group can maintain a particular religious symbol." As illustrated above, the factors used by the Court in Marshfield apply equally to the case at hand, thus the City's requirements for the auctioning of the Cross violated the Establishment Clause of the United States Constitution.

II. CERTIORARI SHOULD BE GRANTED WHEN A NINTH CIRCUIT COURT OF APPEALS DECISION DIRECTLY CONTRADICTS ANOTHER NINTH CIRCUIT COURT OF APPEALS DECISION.

a.) The California Constitution's No Preference/No Aid Clause can apply if a religious display previously found to be unconstitutional when located on government owned land is currently displayed on private property.

The Ninth Circuit Court of Appeals, in affirming the District Court's decision in Kong v. San Francisco, et al., stated that the remedy fashioned in Carpenter v. City & County of San Francisco, 93 F.3d 627 (9th Cir. 1996), adequately resolved any No Preference Clause violation - the Cross is now located on private property. See Ellis v. City of La Mesa, 990 F.2d 1518, 1525 (9th Cir. 1993) ("As a threshold consideration [in a no Preference Clause inquiry], we must determine if the display is on public property."] California Constitution's No Aid/No Preference Clause, Article XVI, Section 5 states:

> Neither the Legislature, nor any country, city and county, . . . shall ever make an appropriation, . . . or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help support or sustain any . . . other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of real property or real estate ever be made by the state, or any city, city and county, . . . for any religious creed, church, or sectarian purpose whatsoever . . .

Ninth Circuit Appellate Judge Canby's opinion in the case at hand, referring to the Ellis holding, stated;

> "That statement was simply an introduction to the analysis in the context of that case; it did not announce a rule that a local government could never violate the "no preference" clause when the religious display is on private property. Certainly sale by a city of a tiny plot of land in a park on a condition that the purchaser maintain a particular religious symbol on it would violate the "no preference clause". See Murphy v. Bilbray, 1997 WL 754604 at *10 (S.D. Cal. 1997).

Despite Justice Canby's opinion in the case at hand, the Ninth Circuit Court of Appeals never got to the question of whether the transfer of the land constituted a violation of the California Constitution's No Preference/No Aid Clause.

The Ninth Circuit Court of Appeals finding that the remedy fashioned in Carpenter adequately resolved any No Preference Clause violation because the cross is now located on private property is in direct conflict with case law from the Ninth Circuit Court of Appeals, Paulson v. City of San Diego, 294 F.3d 1124 (9th Cir. 2002).

In Paulson, the City of San Diego sought to sell park land containing a forty three (43) foot cross used as a war memorial atop Mount Soledad Natural Park. San Diego had various requirements for bidding on the land, including requiring bidders to explain their experience maintaining similar properties, their financial condition and their proposed use of the property. There were also land use restrictions

requiring that the land continue to be used as a war memorial, either by maintaining the cross or, if the bidder wished to remove the cross, by the construction of a new war memorial. The City of San Diego eventually sold the land to the Mount Soledad Memorial Association, the organization that had maintained the cross while the land was owned by the City. The Court of Appeals En Banc held that the sale of public land to the Association on which the forty-three-foot (43') cross stood violated the California Constitution's No Preference/No Aid Clause.

The Court in Paulson stated that in regards to the California Constitution's No Preference/No Aid Clause that:

> Given the ordinary meaning of those words, the text of the provision has enormous breadth. It is possible for the government's transfer of anything to violate the provision if the transfer is in aid of any sectarian purpose. Therefore, all forms of governmental aid are subject to scrutiny. Further when this provision was adopted in 1879, the term purpose commonly meant in this context an end, effect; or consequence. Worcester, Joseph E. A Dictionary of the English Language 1158 (New Ed. Sup 1897). In other words, aid to a sectarian purpose simply meant aid to a sectarian use. **Moreover, the section specifically prohibits the transfer of a real personal property for any sectarian purpose.** (Emphasis added.)

Thus, the Ninth Circuit Court of Appeals in Paulson found that the No Aid/No Preference Clause of the California

Constitution applies even if the Mount Soledad Cross is now located on private property. The Ninth Circuit Court of Appeals in Kong, under similar facts, has a conflicting finding, namely that the No Aid/No Preference Clause of the California Constitution does not apply because the Mount Davidson Cross is now located on private property.

The Paulson decision appears to be the better reasoned of the two because it explicitly addresses the intent of the California No Preference/No Aid Clause and is supported by case law. Under case law, the California Constitutional No Preference/No Aid provision prohibits not only actual preference but prohibits any appearance that the government has allied itself with one specific religion. Hewitt v. Joyner 940 F. 2.d 1561, 1566 (9th Cir. 1991). In addition, the No Preference/No Aid Clause prohibits governmental support for religion in any form. It bans not only monetary aid, but additionally any official involvement that promotes religion. California Educ. Facilities Auth. v. Priest, 12 Cal. 3d 593, 605 fn. 12.(1973). The Court in Kong makes no analysis and simply states in its decision that the No Preference/No Aid Clause does not apply. Thus, there is a conflict within the Ninth Circuit, and following the better reasoned Paulson decision, writ of certiorari should be granted to correct the ruling in Kong and find that the California Constitution's No Preference/No Aid Clause can apply if the land in question has been sold to a private party.

b.) The sale of city-owned Mount Davidson Park containing a cross to the Council of Armenian American Organizations of Northern California violated the California Constitution's No Aid/No Preference Clause.

Having shown that the California No Aid/No Preference Clause applies to the sale of the Mount Davidson Cross by the City to the Council, the similar facts of Paulson and Kong presented earlier show that there was indeed a violation of the California No Aid/No Preference Clause. The Court in Paulson v. City of San Diego, 294 F. 3d 1124, 1132 stated:

> Here, the City sought to sell the land atop Mount Soledad for the undeniably secular purpose of ensuring the presence of a war memorial on the site. California law nevertheless requires us to analyze whether the City's conduct *also* aided a sectarian purpose. Complicating matters for the City is the fact that the land for sale is the site of the cross, a sectarian war memorial. In the Invitation, the City made clear that (1) the cross will be conveyed to the purchaser of the land (2) the purchaser could satisfy the condition that the site be used as a war memorial by keeping the cross there, and (3) the highest purchase price and the buyer's financial capability were keys to a successful bid. The City thereby granted a direct, immediate, and substantial benefit in aid of a Christian message. To those potential buyers who wanted to preserve the cross or convey its message, the City gave away for free an economically valuable means of fulfilling the main condition of the sale. By contrast, to

> those potential buyers who wanted to construct a nonsectarian war memorial, the City conveyed nothing that would help satisfy the obligation to maintain the site as a war memorial. To the contrary, those purchasers would be saddled with the costs of removing the cross and constructing an alternative memorial.

Similarly in Kong, the City made clear that (1) the cross on Mount Davidson will be conveyed to the purchaser of the land, (2) the purchaser could either keep the Cross there or remove it but could not build any new structures on the land, (3) the purchaser was required to keep the area open to the public. Thus in Kong, as in Paulson, the City granted a direct, immediate, and substantial benefit in aid of a Christian message. To those potential buyers who wanted to preserve the Cross or convey its message, the City gave away for free an economically valuable way of spreading their message. By contrast, to those potential buyers who wanted to remove the unconstitutional cross from the public park, the City conveyed nothing that would help make the site valuable to them as they did not allow any new structures to be built on the site and the site had to be kept open and accessible to the public. Those purchasers would be saddled with the costs of removing the Cross and being left with land that could not be improved. Thus, for the above-stated reasons, the California Constitution's No Preference/No Aid Clause was violated.

CONCLUSION

THEREFORE, Petitioners DAVE KONG and JOHN MESSINA respectfully request of this Court that it GRANT their Petition for a Writ of Certiorari.

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APPENDIX

DISTRICT COURT DECISION

United States District Court for the Northern District of California
No. C97-4072 MMC
Memorandum of Decision Entered January 3, 2000;
Findings of Fact and Conclusions of LAW

This action before the Court challenges the constitutionality of the display of a large concrete and steel Latin cross in Mount Davidson Park ("Mount Davidson Cross" or "Cross").

Plaintiffs Dave Kong ("Kong") and John Messina ("Messina") bring this action against defendants City and County of San Francisco ("City"), San Francisco Recreation and Parks Commission and Joel Robinson, its Acting General Manager, ("collectively "City defendants") and the Council of Armenian American Organizations of Northern California ("Council"), alleging the continued maintenance and display of the Mount Davidson Cross violates the No Preference and No Aid to Religion Clauses of the California Constitution and the Establishment Clause of the United States Constitution.

The matter was tried to the Court over a five-day period in June 1999, and was deemed submitted on July 14, 1999 upon filing of final post-trial briefs. Appearing for City defendants were Peter Obstler and Teresa L. Stricker of the Office of the San Francisco City Attorney and appearing for the Council were Christine Tour-Sarkissian and Roger Bernhardt.

Having fully considered the evidence submitted, the papers filed in support of an in opposition to the parties' respective positions, and the arguments of counsel, the Court by this memorandum of decision hereby issues its findings of fact and conclusions of law.

PROCEDURAL AND FACTUAL BACKGROUND

Mount Davidson Park is comprised of approximately 40 acres of wooded land situated on Mount Davidson in the City and County of San Francisco. In 1932 the City gained title to the land and established the park. The Cross, located on a plateau at the top of the park, stands 103 feet tall and measures 39 feet across. It was commissioned by the City in 1933 and completed in 1934. Over the ensuing years, it served as a traditional gathering place for Easter sunrise services and, until the City halted the practice in 1990, was at various times illuminated, most frequently during the week before Easter and during the Christmas season. The Cross is a familiar part of the San Francisco skyline and is visible from many parts of the City.

On June 28, 1990, Victor Carpenter, and a number of individual plaintiffs associated with the American Civil Liberties Union, American Jewish Congress and Americans United for Separation of Church and State ("Carpenter plaintiffs"), filed a lawsuit against the City in federal district court, alleging that the City's ownership and maintenance of the Mount Davidson Cross violated both state and federal constitutional provisions respecting the separation of church and state. The district court granted summary judgment in favor of the City. In August 1996, the Ninth Circuit Court of Appeals reversed, holding the City's ownership and maintenance of the Cross on public land violated the No Preference Clause of the California Constitution, and remanded the case to the district court for purposes of fashioning appropriate relief. See Carpenter v. City & County of San Francisco, 93 F.3d 627 (9th Cir. 1996), cert denied, 520 U.S 1118 (1997).

In March 1997, the Carpenter plaintiffs and the City began to explore a resolution of the Carpenter case based on the sale of the land on which the Cross stands to a private party.

On March 31, 1997, Messina sent a letter to the Mayor's

office, expressing his interest in purchasing the land; requesting information about any proposed sale and expressing his concern that religious organizations not be given preference.

Thereafter, on June 5, 1997, the Recreation and Parks Commission adopted Resolution No. 97-06-080, approving the formulation of a sales proposal for the disposition of not more than .5 acres of land atop Mount Davidson, including the land on which the Cross stands. The resolution specifically provided that any land sold must remain open space and available for public use, and that the sale would be contingent upon approval by the Board of Supervisors and the electorate.

On June 25, 1997, the City's Real Estate Department contracted with the California Newspaper Service Bureau to publish the San Francisco Independent, the newspaper designated by the Board of Supervisors for publication of all official City advertising, an announcement of a public auction and invitation to b id on .38 acre parcel comprising the flat, cleared area atop Mount Davidson, including the land on which the Cross stands ("Parcel").

The Invitation to Bid was published in the Independent on June 28, July 1, July 5, July 8 and July 12, 1997. It set forth the date, time and location of the auction and summarized the conditions of sale and the covenants, restrictions and easements to be included in the deed.

Among other things, the Invitation to Bid informed prospective purchasers that a minium bid of $20,000 was required to be deposited no later than July 14, 1997. It specified that the property could be used only for open space accessible at no cost to the public and that no new structures could be constructed thereon. The Invitation to Bid also announced that the City's Real Estate Department would conduct a tour of the Parcel on July 8, 1997 for all interested parties and advised that copies of the preliminary title report, map of the Parcel, Offer to Purchase and quitclaim deed would be on file and available

at the Real Estate Department as of July 7, 1997.

On July 7, 1997, the above-referenced documents were made available for public inspection as indicated in the Invitation to Bid. No provision in deed required preservation of the Cross.

On July 8, 1997, the tour of the parcel was conducted by a representative of the Real Estate Department. Among those attending was plaintiff Kong and a member of the Armenian American community.

On July 9, 1997, the Board of Directors of the Council authorized the expenditure of funds to obtain the Parcel as a memorial to the victims of the Armenian Genocide of 1915-1918.

By July 14, 1997 deadline, three bidders had submitted the requisite deposit and prequalification materials: (1) the San Francisco Museum, (2) the Friends of Mount Davidson Conservancy, and (3) the Council.

On July 15, 1997, the Mayor's office responded to Messina's letter.

On July 19, 1997, Messina's attempt to prequalify for the bidding was rejected as untimely.

On July 21, 1997, the Real Estate Department conducted a public auction of the parcel. The Council placed the high bid of $26,000 and executed the Offer to Purchase. The Council's offer was accepted by the City, subject to the approval by the Board of Supervisors and ultimately the electorate.

In August 1997, the Board of Supervisors moved to place the sale on the ballot. Approximately one month thereafter, plaintiffs moved to intervene in the Carpenter case, which motion was heard and denied on October 10, 1997.

On November 4, 1997, the voters of San Francisco approved the proposed sale of the Parcel to the Council. On December 8, 1997 plaintiffs filed the instant action.

On January 23, 1998, the sale of the Parcel closed and

the City conveyed the property to the Council by the form of quitclaim deed initially provided to prospective bidders. At that point, the City ceased to maintain the Parcel.

In April 1998, an agreement was entered into among the parties to the Carpenter action and the Council ("Agreement") whereby it was agreed that the case would be settled in accordance with the terms of a stipulated judgment, that signs would be posted identifying the Parcel as private property and setting forth the history of the conveyance[1], that lighting of the Cross would be restricted to two days per calendar year, and that no additional religious structures of any kind would be erected. On April 17, 1998, the Court entered final judgment in the Carpenter action pursuant to the parties' stipulation.

Since that time, the City has placed at the base of each of the trails leading to the Parcel and at the boundary of the Parcel itself a sign measuring 24 by 30 inches and incorporating

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[1] The agreed upon language reads as follows:

> The flat cleared area at the top of Mount Davidson, including the land upon which the cross stands, is not owned or maintained by the City and County of San Francisco. The City sold this land in accordance with the constitutional principle of separation of church and state, which is fundamental to our political system. The transfer was made to comply with a federal court decision holding that the presence of the cross on public land violated the California Constitution. The City sold the land at a public auction to the Council of Armenian American Organizations of Northern California, a non-profit, secular corporation. The conveyance was approved by the San Francisco voters on November 4, 1997.

the language set forth in the Agreement. The signs are located in such a fashion that park visitors will pass at least one sign before reaching the Parcel. The City does not maintain the Parcel, provides no electrical service for the Parcel, and issues no permits for its use.

LEGAL STANDARD

The United States Constitution prohibits any law "respecting an establishment of religion." U.S. Const. amend. I.

Article I, Section 4 of the California Constitution provides:

> Free exercise and enjoyment of religion without discrimination or preference are guaranteed . . . The legislature shall make no law respecting the establishment of religion.
>
> Cal. Const., art I, § 4.

Although the second part of the state constitutional guarantee closely parallels the Establishment Clause as set forth in the First Amendment to the United States Constitution, the earlier language, or No Preference Clause, has been interpreted by California state courts as being broader in scope and more protective of the principle of separation than the federal guarantee. See Carpenter, 93 F. 3d at 629; Okrand v. City of Los Angeles, 207 Cal. App. 3d 566, 571 (1989).[2]

Plaintiffs raise both federal and state constitutional

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[2] Article XVI, Section 5 of the California Constitution provides in pertinent part that no governmental entity shall "make an appropriation. . .or grant anything to or in aid of any religious sect, church, creed or sectarian purpose. . .nor shall any grant or donation of personal property or real estate ever be made . . .for any religious creed, church or sectarian purpose whatever. . . . " Cal. Const., art. XVI, §5.

issues. It is well settled that federal constitutional issues should be avoided where the case can be decided on state law grounds. See Carreras v. City of Anaheim, 768 F.2d 1039, 1042-1043 (9th Cir. 1985). "Where state provisions offer more expansive protection than the federal constitution, [the Court] must address the state constitutional claims in order to avoid unnecessary consideration of the federal constitutional claims." Vernon v. City of Los Angeles, 27 F.3d 1385, 1392 (9th cir. 1994). Accordingly, the Court turns first to the California Constitution to decide this case.

DISCUSSION

Under the No Preference Clause, "not only may a government body not prefer one religion over another, it may not appear to be acting preferentially." Hewitt v. Joyner, 940 F.2d 1561, 1567 (9th Cir. 1991), cert. denied, 502 U.S. 1073 (1992). In considering whether the display of the Mount Davidson Cross complied with this constitutional mandate, Carpenter looked to the five-factor test distilled from relevant California case law by the court of appeals in Ellis v. City of La Mesa, 990 F.2d 1518 (9th Cir. 1993), cert denied, 512 U.C. 1220 (1994). See Carpenter, 93 F.3d at 629-630.[3] As set forth in Ellis, the five factors are: (1) the religious significance of the display; (2) the size and visibility of the display; (3) the inclusion of other religious symbols; (4) the historical background of the display; and (5) the proximity of the display to government buildings or religious facilities. Ellis, 990 F. 2d at 1524-1525. After applying the Ellis test, the Carpenter court

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[3] In Ellis, the district court had, inter alia, enjoined the display of two large Latin crosses on public park land in San Diego, California ("the Mt. Soledad Cross" and "the Mt. Helix Cross"). The court of appeals affirmed. Ellis, 990 F.2d at 1529.

found that with the exception of the fifth factor, the Elli factors all "counseled that the Mount Davidson Cross violates the No Preference Clause." Carpenter, 93 F.3d at 632. The facts have changed, however, since Carpenter was decided.[4] As the court of appeals noted, "As a threshold matter, it must also be shown that the display is on public property. Here, San Francisco does not dispute that the Mount Davidson Cross stands on public property." Id. at 630, n4.

Defendants now argue, ergo, the sale of the land on which the Cross sits resolves the matter in defendants' favor. Plaintiffs respond that the conveyance to the Council is basically a sham and that for all intents and purposes there has been no material change in the circumstances from those presented in Carpenter.

In assessing the relative merits of the parties' respective positions, the Court notes at the outset that in neither Ellis nor Carpenter did the court of appeals mandate a particular remedy for resolving the constitutional infirmity. Nor do plaintiffs cite the Court to any authority that would preclude a valid sale, as opposed to removal of the display, as a means of complying with the No Preference Clause. The issue thus presented is whether the particular transfer in question passes constitutional muster.

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[4] The parties have changed as well. The Court thus notes at the outset that plaintiffs have standing to bring this challenge. Kong is a City resident and taxpayer. Messina is a resident of San Jose, California, who attempted unsuccessfully to bid on the land on which the Cross is situated. Each plaintiff testified he is offended by the presence of the Cross and forgoes using the park as a consequence. See Hewitt v. Joyner, 940 F.2d 1561, 1564-65 (9th Cir. 1991) (finding standing where plaintiffs unable to freely use public park due to display of religious statuary).

Although the Court has neither been cited to nor found any state or federal case at the appellate level addressing the constitutionality of a religious display on property formerly owned by a public entity, the parties and Court do have the benefit of the district court's reasoning in Murphy v. Bilbray, 1997 WL 754604 (S.D. Cal. 1997), a case involving the sale of land beneath Mt. Soledad Cross in San Diego.[5] In Murphy, the district court held that "[b]oth the method of sale and the amount of land sold underneath the Mt. Soledad cross" failed to cure the constitutional infirmity. Id. at *11.

In reaching this conclusion, the court in Murphy noted a number of problems with the transfer there at issue, one of which in that court's opinion being sufficient to render the transfer unconstitutional. First, as the court observed, the City of San Diego had taken an express public position to "save" the Mt. Soledad Cross. Second, the City of San Diego had entered into a negotiated sale with a single purchaser, who agreed as a condition of the sale to maintain the cross; no other person or entity was allowed to bid. Third, the land sold was a plot measuring approximately 15 feet by 15 feet, situated in the middle of roughly 170 acres of municipally owned and maintained park land. Id. at *8, *10-11.

The facts here are distinguishable. First, there was no campaign to "save" the Mount Davidson Cross. In fact, there is no statement by the City to that effect. That the City and the

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[5] While Ellis was pending, the City of San Diego voted to authorize the sale of a plot of land underneath the Mt. Soledad Cross to a private party. The Court of appeals declined to address issues concerning compliance with the district court's injunction, leaving the decision to the district court in the first instance. Ellis, 990 F.2d 1528-1529. In Murphy, the district court resolved those issues against the city.

Carpenter plaintiffs sought a solution other than outright destruction of the Cross does not run afoul of the holding in either Ellis or Carpenter. See also Separation of Church and State Committee v. City of Eugene, 93 F.3d 617, 626, n.13 (9th Cir. 1996)(O'Scannlain, J. concurring) (stating district court has wide discretion to consider a variety of remedies including transfer of land and noting the Carpenter plaintiffs "welcome suggestion that the Cross could continue to stand if the land beneath were rendered nonpublic").

Further, the sale at issue here was conducted by means of an open and public auction. There was no limit to the number of bidders no restriction on the prevailing bidder's decision as to whether to retain the Cross.

Plaintiffs argue, however, that there was a de facto selection process and further that the City took active steps to exclude plaintiffs from the bidding. As to the first point, plaintiffs assert that the method of valuation of the Parcel, as well as the prequalification and minimum bid requirements reflect an intent to exclude bidders not likely to remain the Cross, or at a minimum give the appearance of such. On this point, the Court heard from several City department heads charged with carrying out the auction. Based on that testimony, the Court finds the method of valuation reasonable and that the procedures were designed to insure an orderly auction. Further, the Court fails to see how the procedures adopted suggest a preference for bidders holding any particular sentiment with respect to the Cross.

As to the second point, plaintiffs' claim of malfeasance, plaintiffs assert that City employees intentionally misled Messina to the effect that he missed the deadline by which minimum bids were to be posted. Specifically, Messina testified that in late March 1997, at the suggestion of an employee in the Mayor's office, he mailed a letter to that office requesting information as to the future disposition of the Cross

and that the Mayor's Office did not respond to his letter until the day after the prequalification deadline. Messina further testified that he was prepared to submit a bid of up to $100,000. The Court accepts Messina's testimony as to his intent and ability to participate in the bidding process. This evidence does not end the discussion, however. The Mayor's secretary responsible for the correspondence in question explained the process for responding to inquiries about subjects of interest to the public and why any delay in responding to plaintiff was not the result of any desire to enhance the prospects of bidders favoring retention of the Cross. The Court accepts the explanation and further notes that the prequalification requirements were published repeatedly in the City's official newspaper, in fact on several more occasions than is usually the case. Indeed, Kong was aware of those requirements and attended the City-sponsored tour of the site as announced in the Independent. For the reasons stated, the Court finds no malfeasance or other improper attempt to affect the result of the auction.

Finally, the nature and size of the parcel of land conveyed to the Council differs from that transferred in Murphy. In Murphy, the City of San Diego, for all practical purposes, jig-sawed around the base of Mt. Soledad Cross and sold the cross to the city's preferred buyer. Here, the City has conveyed a more sizeable piece of land. Equally important, that land is usable. The Parcel is a flat, cleared lot capable of accommodating a substantial number of persons and is a suitable venue for events sponsored by its present owners.

The very nature of those events also serves to inform the public as to the fact of private ownership. It was the Council's purpose in purchasing the Parcel to bring to the attention of the public and to recognize a significant event in the history of the Armenian people, in the Council's words, "to commemorate the Armenian Genocide." In fact, the sole purpose of the Council,

a nonprofit secular corporation comprised of representatives of thirty-two Armenian American nonprofit organizations, is to find suitable properties to be used as memorials to the victims who perished in Turkey at the early part of the century.

Further, contrary to the single "small disclaimer plaque" on Mt. Soledad, see Murphy, 1997 WL 754604 at *11, the signs indicating the Council's ownership are large, and strategically located at every trail head to insure that visitors to the park will pass at least one sign before reaching the Parcel. Although the commemorative purpose is not referenced in the message, the signs clearly apprise park visitors of the conveyance to the Council and that the Parcel, including the Cross, is privately owned and maintained. Since the time of the transfer, nothing in the manner in which the property has been used by the Council or in the conduct of the City has suggested to the contrary.

Under the particular facts discussed herein, the Court finds that by reason of the City's conveyance of the parcel of land on which the Mount Davidson Cross is situated, the display of the Cross no longer violates the No Preference Clause of the California Constitution. For the same reasons, the Court finds that display does not violated the Establishment Clause or the Aid to Religion Clause of the California Constitution.

As stated, the protection afforded by the California Constitution has been held to exceed that provided by the United States Constitution. Nevertheless, the Court has evaluated the conveyance and display in question under relevant federal case law. In Lemon v. Kurtz, 403 U.S. 602 (1971), relied upon by plaintiffs, the United States Supreme Court established a three-part test for reviewing state action under the Establishment Clause: (1) the challenged state action must have a secular purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) the action

must not foster an excessive government entanglement with religion. Lemon, 403 U.S. at 612-613. To pass constitutional muster, all three criteria must be satisfied. Id. Plaintiffs argue that the display of the Cross fails the Lemon test for essentially the same reasons that plaintiffs argue the display fails under the No Preference Clause.

Based on the factual findings set forth above, the Court finds no violation of the Establishment Clause under Lemon. In particular, the Court finds the purpose of the sale to be neutral, specifically, to comply with the court's mandate in Carpenter. Further, the primary effect of the conveyance neither advanced nor inhibited religion. By use of an open auction process, the City left the decision as to the fate of the Cross to the ultimate purchaser. Under the Establishment Clause, "it is no violation for government to enact neutral policies that happen to benefit religion." Capital Square Review & Advisory Bd. V. Pinette, 515 U.S. 753, 764 (1995). Lastly, there is no government entanglement with religion as the only relationship the City retains with respect to the Parcel is the right to enforce the restrictions in the deed.

CONCLUSION

Both the Mount Davidson Cross and the litigation it has engendered have had a long and varied history. For the reasons expressed, the Court concludes this chapter by finding the display of the Cross under the circumstances presented violates neither the California nor United States Constitution and, accordingly, finds in favor of defendants and against plaintiffs on plaintiffs' complaint for declaratory and injunctive relief.

The Clerk is instructed to enter judgment for the defendants.

IT IS SO ORDERED.

Dated: Jan 3, 2000

MAXINE M. CHESNEY
United States District Judge

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT
No: 00-15261
D.C. No. CV-97-04072-MMC/MJ
Appeal from the United States District Court for the Northern District of California Maxine M. Chesney, District Judge, Presiding
Argued and Submitted July 9, 2001
San Francisco, California, Decision Filed September 5, 2001
Before: CANBY, HAWKINS, and GOULD, Circuit Judges.

The district court's factual finding that the sale of the Mount Davidson parcel "was conducted by means of an open and public auction" finds strong support in the record. Invitations to bid were published five times in the newspaper designated by the Board of Supervisors for publication of official City advertising. Plaintiff Kong must have seen or been informed of this publication, because he attended the public tour and inspection detailed therein. Further, plaintiffs submit no reason why the district court, as finder-of-fact, clearly erred in deciding to believe the testimony of the Mayor's secretary that "any delay in responding to [plaintiff Messina's inquiry] was not the result of any desire to enhance the prospects of bidders favoring retention of the Cr[illegible]"

The remedy fashioned by the parties in Carpenter v. City & County of San Francisco, 93 F.3d 627 (9th Cir. 1996), adequately resolved any No Preference Clause violation – the Cross is now located on private property. See Ellis v. City of La Mesa, 990 F.2d 1518, 1525 (9th Cir. 1993)("As a threshold consideration [in a No Preference Clause inquiry], we must determine if the display is on public property.").

The remedy also results in No Establishment Clause violation. The Cross would violate the Establishment Clause if it had the effect of endorsing religion. See County of Allegheny

v. Am. Civil Liberties Union, 492 U.S. 573, 595 (1989). The contours of "effect" have been analyzed under the "perception of endorsement" test developed in Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring). The test analyzes "[w]hether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval [to a reasonable person]." Id. However, "the Establishment Clause inquiry cannot be distilled into a fixed, per se rule. Thus, '[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval or religion.'" Capital Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 778 (1995) (O'Connor, J., concurring) (quoting Lynch, 465 U.S. at 694 (O'Connor, J., concurring)).

This case is different in its circumstances from Freedom From Religion Found., Inc. v. City of Marshfield, 203 F.3d 487 (7th Cir. 2000). Though both cases involve the sale of relatively small parcels of public parks containing religious statues, the physical characteristics of the Mount Davidson parcel are quite different from those of the parcel in Marshfield. See Marshfield, 203 F.3d at 494 (basing holding of perception of endorsement on historical association of parcel with public forum, dedication of property to public use, and physical relation of parcel to the rest of the park). In Marshfield, "the [parcel was] not physically differentiated from the surrounding public park, and no visual boundaries currently exist[ed] that would inform the reasonable but unknowledgeable observer that the [parcel] should be distinguished from the public park." Id. On the contrary, the Mount Davidson parcel is physically differentiated from the rest of the park because it is comprised of a clearing at the Park's peak. The rest of Mount Davidson Park contains abundant tree-cover, which serves to visually differentiate the Park and the parcel and ensures that Park visitors will not often be able to see the Cross. Additionally,

unlike Marshfield's single plaque located in front of the statue on the private parcel, 203 F.3d at 490, Mount Davidson Park contains several signs throughout the park describing the private nature of the parcel and the circumstances of the conveyance:

> The flat cleared area at the top of Mount Davidson, including the land upon which the cross stands, is not owned or maintained by the City and County of San Francisco. The City sold this land in accordance with the constitutional principle of separation of church and state, which is fundamental to our political system. The transfer was made to comply with a federal court decision holding that the presence of the cross on public land violated the California Constitution. The City sold the land at a public auction to the Council of Armenian American Organizations of Northern California, a non-profit, secular corporation. The conveyance was approved by the San Francisco voters on November 4, 1997.

See Capital Square, 515 U.S. at 776 (O'Connor, J., concurring) ("In context, a disclaimer helps remove doubt about state approval of respondents' religious message."); 515 U.S. at 794 (Souter, J., concurring) (restriction of religious displays to one part of a public forum with a permanent sign "marking the area as a forum for private speech carrying no endorsement from the State" would secure Establishment Clause compliance.)

AFFIRMED.

Kong v. City and County of San Francisco
No. 00-15261

Canby, Circuit Judge, concurring:

I agree with the majority that there is sufficient evidence in the record to support the district court's ruling that the auction was properly conducted. Were I deciding this case without the constraint of our very recent decision in Paulson v.

City of San Diego, ___F.3d____, 2001 WL 947353 (9th Cir. Aug. 22, 2001), however, I would conclude that the present arrangement violates the State's "no preference" clause[1] and the Constitution's Establishment Clause. I find it highly significant that the land in question was part of a public park that had an impermissible religious cross on it, and then was conveyed to private parties with a requirement that the land remain open to the public. From the public's viewpoint, nothing has really changed; the land that was public as part of the park remains public despite the change of title, and the religious display remains on it. See Marshfield, 203 F. 3d 487, 495 (7th Cir. 2000). In essence, the land has become a public forum in which only one group can maintain a particular religious symbol. See id. The City's disclaimers, although well phrased and explicit, are not enough, in my view, to overcome the perception arising from the actual use of the land.

My views, however, now appear to be irreconcilable with Paulson, which at least for the moment is the law of our circuit. I therefore concur in the judgment under its compulsion.

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[1] I do not agree with the majority's interpretation of the statement in Ellis v. City of La Mesa, 990 F.2d 1518, 1525 (9th Cir. 1995), that "[a]s a threshold consideration, we must determine if the display is on public property." That statement was simply an introduction to the analysis in the context of that case; it did not announce a rule that a local government could never violate the "no preference" clause when the religious display is on private property. Certainly sale by a city of a tiny plot in a park on condition that the purchaser retain a particular religious symbol on it would violate the "no preference" clause. See Murphy v. Bilbray, 1997 WL 754604 at *10 (S.D. Cal. 1997).

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
No. 00-15261
D.C. No. CV-97-04072-MMC/MJ
(Northern District of California)
ORDER / Filed November 22, 2002
Before: CANBY, HAWKINS, and GOULD, Circuit Judges.

Judge Canby has voted to grant the Petition for Rehearing and has recommended granting the Petition for Rehearing En Banc. Judges Hawkins and Gould have voted to deny the Petition for Rehearing and the Petition for Rehearing En Banc.

The full court has been advised of the Petition for Rehearing En Banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The Petition for Rehearing and the Petition for Rehearing En Banc are denied.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

United States Constitution First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

United States Constitution Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Constitution, Article I, Section 4:

> Free exercise and enjoyment of religion without discrimination or preference are guaranteed . . . The legislature shall make no law respecting the establishment of religion.

California Constitution, Article XVI, Section 5:

> Neither the Legislature, nor any country, city and county, . . . shall ever make an appropriation, . . . or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help support or sustain any . . . other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of real property or real estate ever be made by the state, or any city, city and county, . . . for any religious creed, church, or sectarian purpose whatsoever . . .